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Mailed: July 27, 2005

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Visual Analytics, Incorporated

Serial No. 76465520

Peter J. Willsey and Adam L. Barea of Cooley Godward for
Visual Analytics, Incorporated.

Anne Madden, Trademark Examining Attorney, Law Office 103
(Michael Hamilton, Managing Attorney).

Before Quinn, Walters and Bucher, Administrative Trademark
Judges.

Opinion by Walters, Administrative Trademark Judge:

Visual Analytics, Incorporated has filed an application
to register on the Principal Register the mark DATALETS for
"computer software that monitors changes and additions to
information in databases and provides automatic notification
to users of changes and additions to information in
databases," in International Class 9.¹

¹ Serial No. 76465520, filed October 30, 2002, based on an allegation of
a bona fide intention to use the mark in commerce.

The examining attorney has issued a final refusal to register, under Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1), on the ground that applicant's mark is merely descriptive in connection with its goods.

Applicant has appealed. Both applicant and the examining attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

Preliminarily, we note the examining attorney's objection to Exhibits A and D submitted by applicant with its brief on the ground that this matter is untimely. Applicant did not file a reply brief and, so, did not respond to this objection. The examining attorney does not object to Exhibits B and C to the brief because they are copies of the previously submitted dictionary definitions of "data" and "alert." Exhibit A is a printout from applicant's website that is different from the printout submitted during prosecution of the application. As such, it is untimely and has not been considered. Exhibit D consists of copies from the USPTO database of four third-party registrations. Three of the third-party registrations were listed in applicant's response of October 20, 2003, and, as such, we find that the submission of the actual copies of these registrations is acceptable. Not only did the examining attorney have notice of these registrations, but she did not object to the mere listing of the

registrations by applicant in the October response.

However, we have given no consideration to the copy of Registration No. 2192630, which was not previously listed by applicant in its response and, thus, is untimely.

Turning to the substantive refusal in this case, the examining attorney contends that the mark is a telescoping of the two words DATA and ALERT; that the telescoped mark merely describes a significant feature of the identified goods, namely, that applicant's software "processes data and information [and] send[s] notifications or alerts to defined users when a particular event occurs to change data in a database" (brief, p.4); that purchasers will understand that this "is a positive feature and the primary function of the software" (brief, p. 5); and that the combination of the two descriptive terms DATA and ALERT into DATALEERT creates no incongruity and the mark remains merely descriptive.

Applicant contends that the mark as a whole creates a unique commercial impression different from the individual terms; that the term is not commonly used in this field nor does it possess a common meaning in any field; that competitors have no need to use applicant's mark descriptively; that the mark is, at most, suggestive; and that any doubt should be resolved in favor of publication of the mark.

Both the examining attorney and applicant have submitted definitions of the individual terms "data" and "alert." We note, of most relevance, the definition from *The American Heritage Dictionary of the English Language* (4th ed. 2000)² of "data" as "1. factual information, especially information organized for analysis or used to reason or make decisions [and] 2. *computer science* numerical or other information represented in a form suitable for processing by computer" and of "alert" as "*adjective* - vigilantly attentive; watchful [and] *noun* - a signal that warns of attack or danger"; and from *TechEncyclopedia*, an online dictionary, a definition of "alert" as a "sound or visual signal that indicates that some predefined event has occurred or some error condition has occurred[;] the terms alert and alarm are often used synonymously."

Also in the record are excerpts submitted by applicant from its website wherein applicant makes the following statements (*emphasis added*):

DATAalerts! (Rules and Alerts) is a monitoring and notification system that automatically notifies defined users when a particular event occurs. DATAalerts! is fully configurable allowing users to define the events that trigger notification. DATAalerts! sends notices, through push technology, to **alert** individuals of **data** changes.

The DATAalerts! Rules and Alerts can be set up to notify specific users whenever new information is entered into a database, a specific type of data

² As downloaded from Internet website bartleby.com on July 23, 2003.

is modified, or a scheduled service returns results.

The examining attorney submitted excerpts from a representative sample of articles retrieved from the Lexis/Nexis database. The following are several examples:

The Searchspace system combines both human and **data**-mining rules to generate risk **alerts** at the individual, national, relationship or organizational level. [*Software Development*, May 4, 2004.]

The SEM server then aggregates and correlates the **data** to provide a meaningful look at events within the environment. It can also archive the **data**, send out **alerts** and report on events, trends and usage. [*ComputerWorld*, April 5, 2004.]

Headline: "An inside look at how one of Symantec's security operations centers protects clients from cyber attacks."

...
Hillyard stares at a row of computer screens, all of which display a software application known as the Analyst Response Console (ARC). The color-coded user interface provides **alerts** and **data** to help analysts focus on the most critical events at any given moment. [*ComputerWorld*, March 29, 2004.]

The examining attorney submitted copies of eight third-party registrations for software products. Four of the registered marks include the disclaimed word "data" and the other four registered marks include the disclaimed word "alert." Applicant submitted copies of three third-party registrations for software or related products. Each is a telescoped mark, PDALERT, DERMALERT and AQUALERT, and none include disclaimers of the word "alert." Prior

registrations do not control our determination in this application. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). We must consider each application on its own merits based on the record in that application and *current* circumstances. *In re Sun Microsystems Inc.*, 59 USPQ2d 1084, 1088 (TTAB 2001). Furthermore, examining attorneys have wide discretion in requiring disclaimers. TMEP § 1213.01(a). In many instances USPTO policy directs examining attorneys not to require a disclaimer of a particular descriptive term, such as, when the descriptive term is part of a unitary mark. See, e.g., TMEP § 1213.05. Therefore, the presence or absence of a disclaimer in a particular registration does not necessarily indicate whether or not the USPTO considered a term merely descriptive, even at the time the particular application was examined. We find the third-party registrations submitted by the examining attorney and applicant are of little, if any, probative value.

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the product or service in connection with which it is used, or intended to be used. *In re Engineering Systems Corp.*, 2 USPQ2d 1075 (TTAB 1986); *In re Bright-Crest, Ltd.*, 204 USPQ 591 (TTAB 1979). It is not

necessary, in order to find that a mark is merely descriptive, that the mark describe each feature of the goods or services, only that it describe a single, significant quality, feature, etc. *In re Venture Lending Associates*, 226 USPQ 285 (TTAB 1985). The examining attorney bears the burden of showing that a mark is merely descriptive of the identified goods or services. See *In re Merrill, Lynch, Pierce, Fenner, and Smith Inc.*, 828 F.2d 21567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987).

We agree with applicant that we must consider whether the mark as a whole is merely descriptive and not just the individual elements, *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004). However, it is reasonable to look, first, at the individual terms, "data" and "alert." Regarding the term "data," applicant expressly states that it "does not dispute that 'data' would be understood by a consumer to relate to computer information" (brief, p. 9). Regarding the term "alert," applicant relies on the definition of "alert" as "a signal that warns of attack or danger" to argue that this is a vague term in connection with software. However, we find the evidence of record, including the examining attorney's dictionary definition of "alert," applicant's own website and the excerpted articles, clearly establishes that "alert" in the context of applicant's goods would be understood as a

synonym for "notify." Further, the evidence clearly establishes that the term "data alert" would be merely descriptive of a significant feature of applicant's software, namely, that it is designed specifically to "alert" users to changes that have occurred to information, or "data," in the user's database.

Applicant's argument that consumers would think that the software is a form of data protection against cyber attacks is not well taken. The identification of goods specifies the exact nature of the software and the question we must consider is whether someone who knows what the goods are will understand the mark to convey information about those goods. *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002); *see also In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313 (TTAB 1990); and *In re American Greetings Corporation*, 226 USPQ 365 (TTAB 1985).

We find that the individual terms "data" and "alert" as well as the composite term "data alert" are merely descriptive in connection with the identified goods because the terms describe the above-mentioned feature whereby the software alerts users to changes in data contained in their databases.

However, we must go one step further and consider whether the telescoped term DATALEERT is merely descriptive. This turns on the question of whether the telescoping of "data" and "alert" evokes a new and unique commercial impression.

Applicant makes the following statement in support of its position that the telescoped mark creates a unique impression (brief, p. 9):

... [U]pon encountering applicant's mark, a consumer would first have to recognize that applicant's three-syllable DATALEERTS is suggestive of the four-syllable, different-sounding phrase "data alerts." DATALEERTS is not simply the mere juxtaposition of the terms "data" and "alerts." Rather, DATALEERTS is a unique combination of these two terms, whereby the second "A" in "data" and the "A" in "alerts" are shared, creating a suggestive mark possessing one less syllable than the compound term "data alerts."

It is true that a prospective purchaser may pronounce DATALEERTS as a three-syllable word. However, the two words comprising the mark, "data" and "alerts," are obviously apparent when viewing the mark in connection with the identified goods, regardless of the telescoping of the two words, and it is equally likely the viewer may automatically supply the missing "A" and pronounce the term as "data alerts." The telescoping creates no double entendre or unique characteristic that results in the telescoped mark DATALEERTS being somehow more than a merely descriptive combination of the two individual words "data" and "alerts."

This is not a situation where the goods are encountered under a mark wherein a multistage reasoning process, or resort to imagination, is required in order to determine the attributes or characteristics of the product or services, which would render the mark suggestive. See *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978); and *In re Atavio*, 25 USPQ2d 1361, 1362 (TTAB 1992). Nor do we have any doubt that this mark is merely descriptive in connection with the identified goods. *In re Atavio, supra* at 1363.

In conclusion, when applied to applicant's goods, the term DATALETS immediately describes, without conjecture or speculation, a significant feature or function of applicant's goods, as described above. Nothing requires the exercise of imagination, cogitation, mental processing or gathering of further information in order for purchasers of and prospective customers for applicant's goods to readily perceive the merely descriptive significance of the term DATALETS as it pertains to applicant's goods.

Decision: The refusal under Section 2(e)(1) of the Act is affirmed.